(14,562.)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 118.

HENRY BEUTTELL, PLAINTIFF IN ERROR,

vs.

DANIEL MAGONE, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 2, 1891.

(14,562.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Certiorari	5	2
Complaint	7	3
Bill of particulars	9	5
Answer	11	6
Minutes of trial	13	7
Judgment	14	8
Bill of exceptions	16	8
Statement	16	8
Protest	16	8
Testimony of Henry Beuttell	17	9
Wm. H. Sheehy	22	11
Requests for verdict	23	12
Judge's certificate	24	12
Bond	25	13
Assignment of errors	27	14
Joinder in error	29	14
Citation	31	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 15, 1894.

1 UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Henry Beuttell, plaintiff, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fourth Monday of March next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 964. 12350. Supreme Court of the United States. Henry Beuttell, plaintiff in error, *vs.* Daniel Magone, defendant in error. Writ of error. Charles Curie, attorney for plaintiff in error, 44 Exchange place, N. Y. Due service of a copy of the within writ of error is hereby admitted this — day of ——, 188–. ——— ———, attorney for defendant in error. A copy of the within paper has been this day received at this office, Feb. 25, 1891. Edward Mitchell, U. S. attorney. S. 14 chr.

[File-mark:] U. S. circuit court. Filed Feb. 25, 1891. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 32, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Henry Beuttell, plaintiff in error, against Daniel Magone, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

HENRY BEUTTELL, Plaintiff, *against* DANIEL MAGONE, Defendant. } Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, May 1st, 1888.

CHAS. CURIE,
Plaintiff's Attorney.

Offices, Nos. 11 Exchange place, New York city.

4 [Endorsed:] N. S. 12350. No. 1. N. Y. superior court. Henry Beuttell, plaintiff, against Daniel Magone, defendant. Summons. Chas. Curie, plaintiff's attorney, 11 Exchange place, New York city. Received, U. S. attorney's office, May 3, 1888. Due service hereof admitted this 1st day of May, 1888. Personally served May 1, 1888. Custom-house, New York.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Daniel Magone, defendant, by

Henry Beuttell, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 24 day of May, 1888, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 16 day of May, in the year one thousand eight hundred and eighty-eight.

JOHN A. SHIELDS, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 12350. U. S. circuit court. Henry Beuttell *vs.* Daniel Magone. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, May 16, 1888. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, May 16, 1888. Chas. Curie, plaintiff's attorney.

7 Circuit Court of the United States for the Southern District of New York.

HENRY BEUTTELL, Plaintiffs,
against
DANIEL MAGONE, Defendant. } Complaint.

Plaintiffs complain:

1st. That defendant was during the time hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiffs *were during said times partners in trade under the firm name of* Henry Beuttell, *and as such* duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiffs as and for duties thereon and plaintiffs, in order to obtain said goods, *were* compelled to pay and did pay the sum of five hundred & two $\frac{15}{100}$ dollars in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests in writing, upon each entry of said goods, against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days

had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to *them*.

Wherefore plaintiffs demand judgment against defendant for five hundred & two $\frac{18}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiff.

8 [Endorsed:] 12350. U. S. circuit court. Henry Beuttell, plaintiffs, against Daniel Magone, defendant. Complaint. Chas. Curie, plaintiff's attorney, 11 Exchange place, New York city. Received, U. S. attorney's office, Jun- 2, 1888.

Bill of Particulars.

Name of importer, Henry Bentell.

		Description of goods.	Where imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties under protest.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
					1887.	1887.		1887.	1887.	1887.	
236	1	Carpets	L'pool	Wyoming	Oct. 29	Nov. 3	37 43	Nov. 23	Dec. 1	Dec. 1	M'ch 27
	2	"	"	Aurania	Nov. 2	" 15	93 —	Dec. 20	" 31	" 31	" 27
	3	"	"	Britannic	" 14	" 26	65 90	Nov. 28 1888. Jan. 10 '88	1888. Jan. 6	1888. Jan. 6	" 27
	4	"	"	Egypt	Oct. 24	" 14	82 65	" 10	" 6	" 6	No ans. rec'd.
	5	"	"	Adriatic	Dec. 6	Dec. 20	88 60	" 12	" 16	" 16	Apr. 11
	6	"	"	Etruria	Nov. 24	" 5	84 —	" 17	" 24	" 24	No ans. rec'd.
	7	"	"	Britannic	Dec. 13	" 27	50 60	Dec. 28	" 24	" 24	" "
							502 18				

10 [Endorsed:] 12350. U. S. circuit court, southern district of New York. Henry Bentell against Daniel Magone. Bill of particulars. New York, June 2, 1888. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, Jun 2, 1888.

11 Circuit Court of the United States for the Southern District of New York.

HENRY BEUTTELL *et al.*
versus
JOEL B. ERHARDT, Collector, etc. } N. S. 12350.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiff *were* compelled to pay or did pay to the defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiff filed with the defendant any protest or protests, as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, the defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made were demanded of the plaintiff and were by the plaintiff voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiff, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And, further answering, the defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made were sums due from the plaintiff to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 [Endorsed:] 12350. U. S. circuit court, southern district of New York. Henry Beuttell *et al. vs.* Daniel Magone, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sirs: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, Dec. 11th, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. To Charles Curie, attorneys for plaintiffs. Due service of a copy of an answer of which the within is a copy and of the above notice is hereby admitted. Dated New York, Dec. 11th, 1888. Chas. Curie, attorneys for plaintiffs.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 28th day of January, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable E. Henry Lacombe, circuit judge.

HENRY BEUTTELL }
vs. } N. S. 12350.
DANIEL MAGONE. }

Now comes the plaintiff, by Stephen G. Clarke, Esq., his attorney, and moves the trial of this cause.

Likewise comes the defendant, by Thomas Greenwood, Esq., assistant United States attorney, his attorney.

Thereupon a jury is impanelled and the cause proceeds to trial.

After hearing the evidence of the plaintiff and the argument of counsel for the respective parties—

The jury, by direction of the court, say that they find a verdict for the defendant, and so they say all.

On motion of Stephen G. Clark, Esq., ordered that the plaintiff have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An abstract of the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

14 United States Circuit Court, Southern District of New York.

HENRY BEUTTELL }
vs. } Judgment, February 9th, 1891.
DANIEL MAGONE. }

The issues in this action having been brought on for trial before Mr. Judge E. Henry Lacombe and a jury, at a circuit court of the October term, 1889, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 28th day of Jan'y, 1890, and his costs having been adjusted at $51.85—

Now, on motion of Edward Mitchell, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $51.85, his taxed costs, and have execution therefor.

Judgment signed this ninth day of February, 1891.

JOHN A. SHIELDS, *Clerk.*

15 [Endorsed:] 12350. United States circuit court. Henry Beuttell *vs.* Daniel Magone. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. Filed ——, 188–. Costs, $8—. U. S. circuit court. Filed Feb. 9, 1891, 1.15 p. m. John A. Shields, clerk.

16 United States Circuit Court, Southern District of New York.

HENRY BEUTTELL }
vs. } Bill of Exceptions. N. S. 12350.
DANIEL MAGONE. }

The issues in the above-entitled action came on for trial before the Hon. E. Henry Lacombe, circuit judge, and a jury on the 28th day of January, 1890.

Plaintiff introduced evidence tending to show that he imported certain rugs into the port of New York in the year 1887, which the defendant as collector of customs at said port classified for duty as Tournay velvet carpeting under the provision for "Tournay velvet carpets," contained in Schedule K of the tariff act, March 3, 1883 (22 U. S. Stat. at Large, 488), and of which the plaintiff made entry at said port, and on which the defendant as said collector of customs exacted duty at the rate of forty-five cents per square yard and in addition thereto thirty per centum ad valorem.

Whereupon the plaintiff paid said duty, protesting in due time that the goods were dutiable at only forty per centum ad valorem, and thereafter duly appealed and in due time brought this suit.

The substance of the protests was as follows:

17 "We hereby protest against your decision and assessment of duties as made by you on our importations below mentioned, consisting of certain rugs, claiming said goods to be dutiable as rugs at 40 % ad valorem as provided by Schedule "K" (par. 378, Heyl), act of March 3, 1883, and not at 45 cents per square yard and 30 % or as charged by you." * * *

HENRY BEUTTELL, a witness in his own behalf, *who* having been first duly sworn, testified in substance as follows:

Am the plaintiff in this action; imported these goods covered by the entries and invoices that have been read in evidence; have been in the carpet and rug business in similar articles for fourteen years in America. I produce samples of importation in question, Exhibit S. All the goods are similar to that, varying somewhat in design; exactly the same fabric and made in the same way. This article in 1883 and prior thereto was known in trade and commerce under the name of rug; am familiar with the method of manufacture of carpets and rugs; became so by being connected with it all my life, being in the factory and I have woven them myself. In making a rug the first thing is to put on the design paper. After the design is made the cards are made and put into a Jacquard loom. The worsted was put into its frame in the loom and then woven as a rug. It is a complete article as it is woven. It is not made from a piece of carpet. Exhibit S 2 is a bedside, so known in the trade; is used as a rug at times and is made from a piece of Tournay velvet carpet.

18 The rugs like the sample of goods in suit were called Daghestan rugs and Dag Dag rugs on the invoices and were 36 inches long by 18 or 36 inches wide, 54 inches long by 27 inches wide, 63 inches long by 36 inches wide, or 72 inches long by 44 inches wide.

Being cross-examined by defendant's counsel, witness testified:

Rugs like Exhibit S are woven rug by rug. Generally we make them all the way from tens to fifteens—*i. e.*, ten or fifteen rugs with the unwoven fringe between. They come out of the loom without the fringe tied, and it is cut apart, plaited, and tied afterwards. When our loom stops weaving we have got this (referring to Exhibit S). We cut them out as they are woven. A double amount of worsted comes on at the end for the next rug. The cutting is done after we get the ten or fifteen made. Before the cutting is done they have the appearance of rugs. They are connected by these worsteds end to end by those threads and the fringe is cut midway between the two rugs. The fringe is a part of the continuous thread running through the different rugs. We advertise rugs of this description for sale in this country as Daghestan rugs. There is no difference in the meaning between Daghestan rugs as invoiced and those that are invoiced as Dag Dag goods. We advertise in the Carpet and Upholstery Trade Review. We call these rugs Wilton Daghestan rugs simply because it is a plush fabric.

19 A Wilton carpet is plush fabric. It is a fabric that is made on a wire that has a knife on the end of it, and when the knife cuts it it brings it to a plush. In that respect these rugs have the same character as a Wilton carpet, but that applies to all plush fabric. The back of a Wilton carpet is linen and jute. The back of a rug is cotton, to make it a soft fabric. In weaving a Wilton carpet we use from three to five

frames; in a rug always six. In making a Wilton carpet you make it for a room. We have not so much difficulty in making a Wilton carpet for a room as we have with a rug. A rug has to be specially designed in every shape and form. For instance, you make a Wilton carpet with a design on it. That design has got to be matched. You can cut that carpet for so many lengths and it should match, and it will have to be made as a carpet and has got to be made as a carpet. Here you have a rug, which is simply made for a rug only. There is no matching in this. There is the rug. It is made specially for a rug and for a rug only. Here you have a fabric with which you can cover this whole room today and you can match it up and the carpet will be perfect on the floor. Here you have a rug, and what is it? It is just simply a thing that will lie before the door, and that is all. There is no similarity at all between a rug like Exhibit S and the Wilton carpet. As I have said before, in the one thing it is made for a carpet; in the other thing it is made for a rug. In the Wilton we use different materials. We not only use different materials in the weft,
20 but we also use different materials in the quality of the worsted. Here is a thing which is a plush fabric, same as that, but any gentleman of the jury here can take those pieces of goods and put them together and can see very readily that they are two distinct things. We put worsted into the Wilton fabric and into the rugs like Exhibit S. The top is worsted. The back of Exhibit S is cotton and the back of the Wilton carpet is linen or jute. A Tournay velvet carpet is simply another trade name for a Wilton carpet.

Being re-examined by plaintiff's counsel, the witness further testified:

These articles are sold in this country by the piece—per rug. There is no weaving after it comes from the loom of the fringe. After they are cut apart the fringe is braided and tied and it then becomes a complete rug. The loom upon which the Wilton carpets are woven is a different loom from the one the rugs are woven upon. This is fitted up for a rug loom and nothing else made but rugs in that loom.

By the COURT:

The rugs are always imported in this condition—cut and tied up; never any other way.

By DEFENDANT'S COUNSEL:

The loom upon which the Wilton Daghestan rugs are made is a heavier loom than the one on which you make a Wilton rug or a Tournay velvet carpet.

By the COURT:

21 For the Wilton Daghestan rug it has to be a heavier loom. In making up the six-frame we have to fit those looms for rug business and rug business only.

By DEFENDANT'S COUNSEL:

That does not refer simply to the size. They have to be specially fitted in this way. The difference is in the loom itself, because a six-frame loom has to be made specially and sometimes seven and sometimes eight to make this particular rug. We call it a Wilton Daghestan rug simply because it is a plush fabric, that is all. We do not call it an Aubusson Daghestan rug because we would not put things out by a fictitious name. An Aubusson carpet is a different thing altogether. "Wilton" is a technical word—nothing more or less—and we do not put it out to suggest the idea of a Wilton carpet or something resembling a Wilton carpet; but, being a plush fabric, it is known in the trade as Wilton and nothing more. Saxony, Axminster, Moquette, velvet, and tapestry velvet carpets are all plush fabrics. An Aubusson and the Brussels are not plush fabrics. These rugs are made 36 x 18, 36 x 36, 27 x 54, 63 x 36, and 72 x 44.

We could weave a rug on a loom with less than six frames if it was designed so. It depends on the design, but we don't do that. (Witness shown piece of carpet S 3.) That is a Wilton carpet—the same as the piece Exhibit S 2; same quality and about the same price and made on the same sort of loom. The back of that carpet is linen and jute.

22 WILLIAM H. SHEEHY, a witness for defendant, *who*, having been duly sworn, testified in substance as follows:

I manage and for four years have managed the Lowell carpet account for Smith, Hogg & Gardner in Worth street. Prior to that time I was a member of a commission house, T. B. Shove & Co., carpets and rugs. We made rugs, but not rugs of this fabric. I have seen selling rugs similar to this about two years, but previous to that I bought and sold them, I guess, about 15 years, and am familiar with such rugs to an extent. I have been connected principally with retail business up to within eight years. Since then my business has been the commission business, in New York. We manufacture rugs similar to Exhibit S. I have not handled them since I have been connected with this house. Prior to 1883 I handled rugs similar to Exhibit S. For five years previous to my taking the position with the Lowell company I was three years a member of the commission house of T. B. Shove & Co., agents for the manufacture of Brussels and Wilton and Smyrna rugs; also ingrains. I was seller all that time, and came in contact with other commission houses and wholesale houses that dealt in similar goods. I am familiar with the names that these wholesale houses and other commission houses used in the trade and with the character of the goods; it was a part of my business to become so. Prior to the five years I managed a retail business in Chicago for three years; retail carpets. I was a buyer and manager. We did not do any wholesale business at all. We bought of wholesale dealers and commission men.

23 I know by what name rugs of the character of Exhibit S were bought and sold in the trade and commerce of this country in March, 1883, and prior thereto.

Q. State by what name.

Plaintiff's counsel objected to the question on the ground that it appeared that they were rugs, and that they were not seeking to contradict the fact that they were rugs; that the specific name that the question seems to call for is immaterial and irrelevant. The court overruled the objection and plaintiff's counsel duly excepted.

Articles like sample S were bought and sold in trade and commerce of this country prior to the 1st of March, 1883, as Wilton rugs. A Wilton is a Brussels carpet cut. It is a plush carpet, more correctly speaking.

Q. Does Exhibit S answer to that description?

Plaintiff's counsel objected to the question; the court overruled the objection, and plaintiff's counsel duly excepted.

A. Yes, sir; it does.

Being cross-examined by plaintiff's counsel:

(Shown Exhibit S.)
That is a rug.

The testimony being closed, thereupon both parties rested.

Counsel for plaintiff moved the court to direct a verdict for plaintiff, there seeming to be no material dispute on any point in the case.

Counsel for defendant also asked the court to direct a verdict for defendant on the whole case.

24 Thereupon the court directed the jury to find a verdict for defendant; which ruling and direction counsel for plaintiff then and there duly excepted to; which exception was allowed.

And inasmuch as the foregoing matters of law and fact do not otherwise appear upon the records of the trial, the judge before whom the cause was tried has settled and signed the foregoing as and for the plaintiff's bill of exceptions herein, as of the 28th day of January, 1890.

E. HENRY LACOMBE.

Agreed to.
S. G. CLARKE, *Of Counsel.*
EDWARD MITCHELL,
U. S. Atty & Atty for Def't.

Endorsed: N. S. 12350. U. S. circuit court, southern district of New York. Henry Beuttell *vs.* Daniel Magone. Bill of exceptions. Charles Curie, plaintiff's attorney, 44 Exchange place, N. Y. U. S. circuit court. Filed Jan. 23, 1891. John A. Shields, clerk.

25 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HENRY BEUTTELL
vs.
DANIEL MAGONE. } Bond for Costs.

Know all men by these presents that we, John L. Shea and James Gray, are held and firmly bound unto the above-named Daniel Magone in the sum of two hundred and fifty dollars, to be paid to the said Daniel Magone; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named plaintiff in error has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said writ of error to effect and answer all *and* costs if said plaintiff in error fail to make his said writ — error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. S. SHEA, [L. S.]
45 *Wm St., N. Y. City.*
JAS. GRAY,
45 *Wm St., N. Y. City.*

Sealed and delivered and taken and acknowledged this 24th day of February, 1891, before me—

[L. S.] WILLIAM H. NORTHUP,
Notary Public, Kings Co., N. Y.

Certificate on file in New York county.

[Endorsed:] 12350. U. S. circuit court, southern district of New York. Henry Beuttell *vs.* Daniel Magone. Bond for costs on writ of error. Approved Feb'y 25, 1891. E. Henry Lacombe. U. S. circuit court. Filed Feb. 25, 1891.

26 UNITED STATES OF AMERICA, } *ss.:*
Southern District of New York, }

John L. Shea and James Gray, being duly sworn, depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

J. S. SHEA, [L. S.]
45 *William St., N. Y. City.*
JAS. GRAY, [L. S.]
45 *William St., N. Y. City.*

Sworn to this 24th day of February, A. D. 1891, before me—
[L. S.] WILLIAM H. NORTHUP,
Notary Public, Kings Co., N. Y.

Certificate on file in New York county.

27 Supreme Court of the United States.

HENRY BEUTTELL, Plaintiff in Error,
vs.
DANIEL MAGONE, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the fourth Monday of March in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiff in error, by Charles Curie, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

CHARLES CURIE,
Attorney for Plaintiff in Error.

28 [Endorsed:] 12350. United States Supreme Court. Henry Beuttell, plaintiff in error, *vs.* Daniel Magone, defendant in error. Assignment of error. Charles Curie, 11 Exchange place, N. Y., attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 26th day of February, 1891. A copy of the within paper has been this day received at this office, Feb. 26, 1891. Edward Mitchell, U. S. attorney, U. S. circuit court. Filed Feb. 26, 1891. John A. Shields, clerk.

29 Supreme Court of the United States.

HENRY BEUTTELL, Plaintiff in Error,
vs.
DANIEL MITCHELL, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the fourth Monday of March, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and

proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Attorney and Attorney for Defendant in Error.

30 [Endorsed:] 12350. United States Supreme Court. Henry Beuttell, plaintiff in error, *vs.* Daniel Magone, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 27th day of Feb'y, 1891. Charles Curie, attorney for plaintiff in error. To Charles Curie, Esq., attorney for plaintiff in error. U. S. circuit court. Filed Feb. 27, 1891. John A. Shields, clerk.

31 UNITED STATES OF AMERICA, *ss:*

To Daniel Magone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of March, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry Beuttell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated February 25th, 1891.

E. HENRY LACOMBE.

32 [Endorsed:] E. & A. A. 964. 12350. U. S. Supreme Court. Henry Beuttell, plaintiff in error, against Daniel Magone, defendant in error. Citation. Charles Curie, 44 Exchange place, N. Y., attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this — day of ——, 189–. —— ——, attorney for defendant in error. A copy of the within paper has been this day received at this office. Feb. 25, 1891. Edward Mitchell, U. S. attorney. S. U. S. circuit court. Filed Feb. 25, 1891. John A. Shields, clerk.

Endorsed on cover: Case No. 14,562. S. New York C. C. U. S. No. 118. Henry Beuttell, plaintiff in error, *vs.* Daniel Magone, late collector of the port of New York. Filed April 2nd, 1891.

Office Supreme Court, U. S.
FILED.
NOV 3 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 118.

HENRY BEUTTELL

against

DANIEL MAGONE.

PLAINTIFF'S BRIEF.

EDWIN B. SMITH,
120 BROADWAY,
New York,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 118.

HENRY BEUTTELL

vs.

DANIEL MAGONE.

PLAINTIFF'S BRIEF.

Statement.

In 1887, plaintiff imported and entered at New York some rugs, which he claimed to be dutiable *eo nomine* at 40% *ad val.*, (22 Stats. 510; Heyl, Par. 378) but which the defendant-collector assessed at forty five cents a square yard and 30% *ad val.* as "Tournay velvet carpeting." (22 Stats. 509, bottom; Heyl, Par. 370). Against this action the plaintiff duly filed a protest, setting forth his said claim, and seasonably took all steps for a judicial ascertainment of his rights. (Rec. 8, fols. 16, 17.)

Called as a witness in his own behalf, Mr. Beuttell identified the goods in suit, of which he produced a

sample, (Ex. S.) and said he had been in the carpet and rug business for fourteen years. Speaking of his present importation, he then testified ;—

This article in 1883 and prior thereto was known in trade and commerce under the name of rug ; am familiar with the method of manufacture of carpets and rugs ; became so by being connected with it all my life, being in the factory and I have woven them myself. In making a rug the first thing is to put on the design paper. After the design is made the cards are made and put into a Jacquard loom. The worsted was put into its frame in the loom and then woven as a rug. It is a complete article as it is woven. It is not made from a piece of carpet. Exhibit S2 is "a bedside", so known in the trade ; is used as a rug at times and is made from a piece of Tournay velvet carpet.

The rugs like the sample of goods in suit were called Daghestan rugs and Dag Dag rugs on the invoices and were 36 inches long by 18 or 36 inches wide, 54 inches long by 27 inches wide, 63 inches long by 36 inches wide, or 72 inches long by 44 inches wide.

Being cross-examined by defendant's counsel, witness testified :

Rugs like Exhibit S are woven rug by rug. Generally we make them all the way from tens to fifteens—*i. e.*, ten or fifteen rugs with the unwoven fringe between. They come out of the loom without the fringe tied, and it is cut apart, plaited, and tied afterwards. When our loom steps weaving we have got this (referring to Exhibit S). We cut them out as they are woven. A double amount of worsted come on at the end for the next rug. The cutting is done after we get the ten or fifteen made. Before the cutting is done they have the appearance of rugs. They are connected by these worsteds end to end by those threads and the fringe is cut midway between the two rugs. The fringe is a part of the continuous thread running through the different rugs. We advertise rugs of this discription for sale in this country as Daghestan rugs. There is no difference in the meaning between Daghestan rugs as invoiced and those that are invoiced as Dag Dag goods. We advertise in the Carpet and Upholstery Trade Review. We call these rugs Wilton Daghestan rugs simply because it is a plush fabric. A Wilton carpet is plush fabric.

It is a fabric that is made on a wire that has a knife on the end of it, and when the knife cuts it it brings it to a plush. In that respect these rugs have the same character as a Wilton carpet, but that applies to all plush fabric. The back of a Wilton carpet is linen and jute. The back of a rug is cotton, to make it a soft fabric. In weaving a Wilton carpet we use from three to five frames; in a rug always six. In making a Wilton carpet you make it for a room. We have not so much difficulty in making a Wilton carpet for a room as we have with a rug. A rug has to be specially designed in every shape and form. For instance, you make a Wilton carpet with a design on it. That design has got to be matched. You can cut that carpet for so many lengths and it should match, and it will have to be made as a carpet and has got to be made as a carpet. Here you have a rug, which is simply made for a rug only. There is no matching in this. There is the rug. It is made specially for a rug and for a rug only. Here you have a fabric with which you can cover this whole room to-day, and you can match it up and the carpet will be perfect on the floor. Here you have a rug, and what is it? It is just simply a thing that will lie before the door, and that is all. There is no similarity at all between a rug like Exhibit S and the Wilton carpet. As I have said before, in the one thing it is made for a carpet; in the other thing it is made for a rug. In the Wilton we use different materials. We not only use different materials in the weft, but we also use different materials in the quality of the worsted. Here is a thing which is a plush fabric, same as that, but any gentlemen of the jury here can take those pieces of goods and put them together and can see very readily that they are two distinct things. We put worsted into the Wilton fabric and into the rugs like Exhibit S. The top is worsted. The back of Exhibit S is cotton and the back of the Wilton carpet is linen or jute. A Tournay velvet carpet is simply another trade name for a Wilton carpet.

Being re-examined by plaintiff's counsel, the witness further testified:

These articles are sold in this country by the piece—per rug. There is no weaving after it comes from the

loom of the fringe. After they are cut apart the fringe is braided and tied and it then becomes a complete rug. The loom upon which the Wilton carpets are woven is a different loom from the one the rugs are woven upon. This is fitted up for a rug loom and nothing else made but rugs in that loom.

By the Court :

The rugs are always imported in this condition—cut and tied up ; never any other way.

By Defendant's Counsel :

The loom upon which the Wilton Daghestan rugs are made is a heavier loom than the one on which you make a Wilton rug or a Tournay velvet carpet.

By the Court :

For the Wilton Daghestan rug it has to be a heavier loom. In making up the six frame we have to fit those looms for rug business and rug business only.

By Defendant's Counsel :

That does not refer simply to the size. They have to be specially fitted in this way. The difference is in the loom itself, because a six-frame loom has to be made specially and sometimes seven and sometimes eight to make this particular rug. We call it a Wilton Dagheston rug simply because it is a plush fabric, that is all. We do not call it an Aubusson Daghestan rug because we would not put things out by a fictitious name. An Aubusson carpet is a different thing altogether. "Wilton" is a technical word—nothing more or less—and we do not put it out to suggest the idea of a Wilton carpet or something resembling a Wilton carpet ; but, being a plush fabric, it is known in the trade as Wilton and nothing more. Saxony, Axminster, Moquette, velvet, and tapestry velvet carpets are all plush fabrics. An Aubusson and the Brussels are not plush fabrics. These rugs are made 36x18, 36x36, 27x54, 63x36, and 72x44.

We could weave a rug on a loom with less than six frames if it was designed so. It depends upon the design, but we don't do that. (Witness shown piece of

carpet S 3.) That is a Wilton carpet—the same as the piece Exhibit S 2; same quality and about the same price and made on the same sort of loom. The back of that carpet is linen and jute.

WILLIAM H. SHEEHY, a witness for the defendant, having been duly sworn, testified in substance as follows:

I manage and for four years have managed the Lowell carpet account for Smith, Hogg & Gardner in Worth street. Prior to that time I was a member of a commission house, T. B. Shove & Co., carpets and rugs. We made rugs, but not rugs of this fabric. I have been selling rugs similar to this about two years, but previous to that I bought and sold them, I guess, about 15 years, and am familiar with such rugs to an extent. I have been connected principally with retail business up to within eight years. Since then my business has been the commission business, in New York. We manufacture rugs similar to Exhibit S. I have not handled them since I have been connected with this house. Prior to 1883 I handled rugs similar to Exhibit S. For five years previous to my taking the position with the Lowell company I was three years a member of the commission house of T. B. Shove & Co. agents for the manufacture of Brussels and Wilton and Smyrna rugs; also ingrains. I was seller all that time, and came in contact with other commission houses and wholesale houses that dealt in similar goods. I am familiar with the names that these wholesale houses and other commission houses used in the trade and with the character of the goods; it was a part of my business to become so. Prior to the five years I managed a retail business in Chicago for three years; retail carpets. I was a buyer and manager. We did not do any wholesale business at all. We bought of wholesale dealers and commission men.

I know by what name rugs of the character of Exhibit S were bought and sold in the trade and commerce of this country in March, 1883 and prior thereto.

Q. State by what name.

Plaintiff's counsel objected to the question on the ground that it appeared that they were rugs, and that they were not seeking to contradict the fact that they

were rugs; that the specific name that the question seems to call for is immaterial and irrelevant. The Court overruled the objection and plaintiff's counsel duly excepted.

Articles like sample S were bought and sold in trade and commerce of this country prior to the 1st of March, 1883, as Wilton rugs. A Wilton is a Brussels carpet cut. It is a plush carpet, more correctly speaking.

Q. Does Exhibit S answer to that description?

Plaintiff's counsel objected to the question; the Court overruled the objection, and plaintiff's counsel duly excepted.

A. Yes, sir; it does.

Being cross-examined by plaintiff's counsel:

(Shown Exhibit S).

That is A RUG.

The testimony being closed, thereupon both parties rested.

Counsel for plaintiff moved the court to direct a verdict for plaintiff, there seeming to be no material dispute on any point in the case.

Counsel for defendant also asked the court to direct a verdict for defendant on the whole case.

Thereupon the court directed the jury to find a verdict for defendant; which ruling and direction counsel for plaintiff then and there duly excepted to; which exception was allowed.

Assignment of errors.

The plaintiff in error assigns for error:—

First. The direction given by the Court to the jury to find a verdict for the defendant. (Rec. 12, fol. 24.)

Second. The verdict rendered conformably to such direction. (*Id.* 7, fol. 13.)

Third. The judgment entered upon that verdict. (*Id.* 8, fol. 14.)

Fourth. Defendant's witness, having sworn he knew by what name our rugs were bought and sold in this country's trade and commerce in March, 1883, and prior thereto, was then asked to "State by what name?" which question was admitted over plaintiff's objection, and its admission is now assigned as error. (Rec. 12 top, fol. 23.)

Fifth. A sample (Exhibit S) of plaintiff's importations in question (which were proved, without dispute, to be "rugs," commonly and commercially) was shown a witness for the defendant, who had just testified that "A Wilton is a Brussels carpet cut—a plush carpet, more correctly speaking," and that witness was asked "Does exhibit S answer to that description?" which question the witness was allowed to answer (affirmatively) despite the plaintiff's objection. The plaintiff excepted and now assigns the admission of said question and answer as error. (Rec. 12, fol. 23.)

Statutes.

Schedule K of the act of March 3, 1883, contains these clauses;—

"Saxony, Wilton and Tournay velvet carpets, forty-five cents a square yard and in addition thereto 30% *ad valorem*. (22 Stats. 509; Heyl, Par. 370.)

. . . . . .

Carpets and carpetings of wool, flax or cotton or parts of either or other material, not otherwise herein specified, 40% *ad valorem*; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets and carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description;—

and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and *rugs*, shall be forty per centum *ad valorem*." (*Id.* 510; Heyl, par. 378, *a*, *b* and *c*.)

The importer claimed to enter his goods at the 40% rate prescribed in this last clause; but the collector exacted the forty-five cents a yard and 30% *ad valorem* additional mentioned in the previous clauses. (Rec. 8, fols. 16, 17.)

POINTS.

I.

Preliminary.

No dispute of fact ever arose in this case.

Our two exceptions to evidence (Rec. 12, fol. 23) present the inquiry whether or not the fact elicited by the first question objected to is at all material, or affords any support to the directed verdict; and whether it was competent by the second to draw out the statement given in response to it; and whether that statement was material to the determination of the issue, and the application of the proper statutory clause to our importation.

That importation consisted of worsted rugs, having cotton backs. (Rec. 9, fols. 17, 18 and 19.)

In our eyes, the vital (undisputed) fact is that our rugs were woven, and taken from the loom, as completed 'rugs'; and were *never* 'carpets', or 'carpetings', or "portions" thereof. (Rec. 9 to 11, fols. 17 to 21, inclusive.)

Not only were they in fact 'rugs', commonly so called, but in and prior to 1883, they were commercially so known—if that makes any difference. (*Id.* 9, fol. 17.) The only additional circumstance stated by the defendant's witness, over our objection, was that they were specifically designated in trade as "Wilton rugs" (*Id.* 12, fol. 23) to which, *nomine non obstante*, we proved they bore "no similarity". (*Id.* 10, fol. 19.)

They were far within the Treasury Department's construction of the Statute, Dec. 27, 1888, defining the difference between carpets and rugs, in that the former cover the whole floor, and the latter do not. (ss. 9174; Rec. 9, fol. 18.)

II.

Intent and meaning of the statute.

Taking the context of the schedule K into consideration, so far as it relates to carpets of different materials and styles (22 Stats. 508, 510) it becomes evident that the meaning and intent of the clause here to be construed (*Ib.* 510, and Heyl, par. 378) is to draw a distinction between those rugs made out of carpets or carpeting by cutting and those that were rugs in their origin, and were never anything else.

The antithetic relation of these provisions is between those rugs which were such *per se* and those which became such by cutting a carpet or piece of carpeting into "portions." Naturally, the latter were dutiable at the same rate as the uncut carpet. (Treas. Dec. of June 27, 1889, 88. 9462.)

These carpets are specifically enumerated by clauses, viz.;—Arbuson, Axminster and chenille, and those woven whole for rooms; (88. 9174) Saxony, Wilton and Tournay velvet; Brussels; Patent velvet and tapestry; Tapestry Brussels; Treble ingrain, three-ply, and worsted-chain Venitian; Yarn Venitian, and two-ply ingrain; Druggets and bockings; Hemp and jute carpeting; Carpets and carpetings of wool, flax or cotton, or parts of either, *or other material*," etc.

Such is the schedule's list of carpets and carpeting. It will be seen that, taking all the preceding clauses with the last quoted, it includes every kind of carpet or carpeting, by whatever name known, and of whatever material composed.

Then the schedule and clause goes next to the subject of "mats, rugs," etc.; first providing that those which are cut-carpet "mats, rugs, screens, covers, hassocks, bedsides, and *other* PORTIONS of carpets or carpeting shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or de-

scription"; then it passes to "the duty on all *other* mats not exclusively of vegetable material, screens, hassocks and rugs," which it places at forty per centum. In R. S. (2d ed.) 472 bottom the words 'not exclusively of vegetable material' are in parenthesis. Apparently, they only qualify 'mats.' So, in act Mar. 2, 1867. (14 Stats. 562.)

Though Schedule K is entitled "wool and woolens" it embraces the whole subject of carpets and carpeting, regardless of component materials; all necessarily, almost, having a linen, hemp or jute backing. It specifies "Wilton," or carpet having a linen and jute back; "Axminster," of linen and worsted; "chenille," with silk characteristic; "Brussels," of linen and worsted (no wool); the "ingrain" with worsted warp and woolen weft; "Druggets," of wool, etc. It generalizes *all* "carpets woven whole for rooms," no matter of what composed; all hemp or jute carpeting; all carpets and carpeting of wool, of flax, or of cotton, separate or mixed together, and of "other material," not covered by the preceding specifications; so including every species of carpet and carpeting. Accordingly, we find no mention of these articles in the cotton, flax or silk schedules.

By natural association, the draughtsman next passed to the subject of mats, rugs, etc.; recognizing that, for dutiable purposes, as well as in common and commercial understanding, these articles were always distinguished from (SS. 9174) though in use having close relation to, carpets. The paragraph provides that all rugs, bedsides, and "*other* portions" of carpets shall pay the duty chargeable upon the carpets of which they are portions. Then it concludes by placing forty per centum on "all other" non-vegetable "mats"; and "screens, hassocks, and rugs."

As all materials of which a carpet can be made are mentioned, in special or general terms, every imaginable rug must have a similarity of character or description, as to its material or combination of materials, to some

one of the carpets to which a duty is attached by the preceding clauses of this schedule; and the only difference must be in their mode of manufacture, as being or not being "portions" of such carpets.

This distinction is one which exists *ab initio*, and is of common recognition. (Rec. 9, end of fol. 17.) Rugs like Mr. Beutell's are woven upon 'rug-looms', which differ from carpet-looms. (*Id.* 10, 11; fols. 20, 21.) They come out of the loom with the fringe attached, not to be sewn on afterward; a complete pattern, not one to be made by matching. (*Id.* 9, 10; fols. 18, 19.)

Though the will of Congress must stand as the reason for its act, these distinctions indicate a sufficient ground for a different and uniform rate of duty. A higher value attaches to a rug, so woven complete, than to one to be made up by patching and sewing; and the rate fixed, applied to that valuation, gives the same *amount* of duty, in dollars and cents, as a higher rate applied to cut-carpet rugs of like components, but of lesser value, because of the inferior method of manufacture, and less satisfactory product.

III.

This not a case of commercial designation; and the specific name of the rug is immaterial.

In regard to the question, found at the top of page 12 of the record, which drew out the fact that plaintiff's rugs were known in trade as "Wilton rugs" our objection of immateriality was well founded; yet the judge who admitted it as material must have treated it as a fact supporting his direction of a verdict against us.

I. A perusal of this statutory clause will show it presents no case for a resort to commercial usage. Whether a rug is like any particular carpet; whether it is a 'portion' of a carpet;—are questions of fact, and aside from any custom of trade.

Newman v. Arthur, 109 U. S. 138 top.
Greenleaf v. Goodrich, 101 *Id.* 284.
Schmieder v. Barney, 113 *Id.* 645.

No special commercial meaning was attached to 'rugs' by the evidence.

Swan v. Arthur, 103 *Id.* 598.

II. The only designation the statute uses, which touches our importations, is "rugs"—'rugs' which are "portions of carpets," and "other rugs"—and there is no claim that these were not 'rugs.' The very question objected to assumes them to be 'rugs,' and inquires by what individualizing name this particular member of the rug family was known. The inquiry was not directed toward taking them out of the 'rug' class, but to ascertain how they were identified within it. This was immaterial.

Smith v. Field 105 U. S. 53.
Lottimer v. Smythe, 17 Int. R. Rec. 12, and Jaffray v. Murphy, 19 *Id.* 143, cited in 96 U. S. 110.

A wool hat is dutiable among "hats of wool," whether bought and sold as a Kossuth, Derby, or other name simply given to indicate a style of hat.

Against the fact, thus proven, that it was *called* a Wilton rug, we have the equally undisputed fact that it bore "*no similarity at all*" to a Wilton carpet, in manufacture, material, quality, or appearance (Rec. fols. 19 and 20); yet it is "character and description," and not name, that determines the rate of duty upon a rug that is portion of a carpet. To nothing entitled to claim the statutory designation of 'rug' does its subordinate appellation attach any consequence of a higher

or lower rate of duty; that rate is imposed upon the 'rug,' by whatever name called.

The defendant's witness explained what he meant, in saying "A Wilton is a Brussels carpet cut," by adding, "It is a plush carpet, more correctly speaking." *(Id.* 12, fol. 23.*)* In a Brussels, the loops of worsted thrown up (in weaving) above the linen weft, and concealing it, are left uncut in the finished carpet; while in a Wilton these loops, thrown a bit higher, are cut with a sharp steel, making the article a 'plush' with the velvety appearance given by the resulting pile.

IV.

Second exception:—

To the witness' statement of a conclusion.

Upon the affirmative reply of defendant's witness to the question, "Does Exhibit S answer to that description?"—referring to his statement that a Wilton was a Brussels converted into a plush by cutting the pile or loops, and upon the question itself, we have this to observe:—

First. If the rug, exhibit S, was not a 'portion' of a carpet, but was (as it was proved and admitted to be) a rug *per se*, its resemblance to any kind or denomination of carpet was immaterial and inconsequential;—yet the judge who admitted this testimony must have given weight to it in directing a verdict.

Second. If the true construction of the statutory provisions is such as to make a likeness in "character or description" material to be determined, then this is solely for the determination of the jury. If pertinent

at all, it is the very thing they are to decide. A witness can point out similarities or differences, the qualities and characteristics possessed by the rug (Exhibit S) in severalty, or in common with any kind of carpet whatsoever; but he has no right to state the conclusion to be drawn from such comparison. This is usurping the province of the jury. Yet the judge treated this testimony as the equivalent of, or requiring, the verdict he directed. Greenleaf v. Goodrich, 101 U. S. 278.

The Court below allowed to be thus introduced the very kind of testimony which this Court has ruled to be properly excluded, when offered by the importer.

Upon the tenth page, at folios 30 and 31, of the transcript in Schmieder v. Barney, No. 109 of Oct. Term, 1884, will be found the statement of the offered testimony, substantially repeated in the Chief Justice's opinion (113 U. S. 645–6) as to whether the goods were known *in trade* as similar to delaines; which was properly excluded.

A fortiori, if a witness cannot testify to a trade recognition of similarity, he cannot as to that fact of likeness or unlikeness which is submitted to the jury.

The objection to the testimony was thus stated by the Chief Justice;—

> "*The effort was to put the opinion of commercial experts in the place of that of the jury* upon a question which as well understood by the community at large as by merchants and importers."

Schmieder v. Barney, 113 U. S. 648.
Milwaukie v. Kellogg, 94 *Id.* 469.
Stillwater v. Coover, 26 Oh. St. 521.
Kelly v. Fond du Lac, 31 Wis. 185–6.
City v. Lindsay, 26 Kans. 432–3.
Barnes v. Newton, 46 Ia. 569, § III.
Strevel v. Hempstead, 44 Barb. 520.
Hopkins v. R. R., 78 Ills. 33.
Perkins v. Ins. Co., 10 Gray, 312.
Mahew v. Sullivan, 76 Me. 111–2.

V.

Conclusion.

The Court below was fundamentally wrong in the construction there given to the statute; and in the admission of testimony. Upon properly admissible testimony, or upon that actually received on the trial, a verdict should have been directed for the plaintiff.

There was error in the judgment rendered, which should be reversed.

EDWIN B. SMITH,
120 Broadway,
New York,
Of counsel for plaintiff.

Office Supreme Court, U. S.
FILED.
NOV 21 1894
JAMES H. McKENNEY,
CLERK.

CASE No. 14562.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY BEUTELL, PLAINTIFF IN ERROR,
vs.
DANIEL MAGONE, LATE COLLECTOR OF the port of New York.
No. 118.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

CASE No. 14562.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY BEUTTELL, PLAINTIFF IN ERROR,
vs.
DANIEL MAGONE, LATE COLLECTOR OF the port of New York.
No. 118.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was an action to recover duties paid under protest. The importations were made in 1887, so that the case is governed by the tariff law of 1883. The action was tried before Judge Lacombe and a jury. At the close of the trial each party moved for the direction of a verdict in his own favor, plaintiff making the concession that there was no question of fact involved. The court directed a verdict for the collector, and plaintiff assigned error. The oral opinion of the court is reported at 48 Fed. Rep., 157, 159.

STATEMENT OF FACTS.

The importations were articles known in commercial language as Wilton rugs, or Wilton Daghestan rugs.

The tariff provision under which they were dutiable was as follows:

> Par. 378. * * * and mats, *rugs*, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings shall be subjected to the rate of duty herein imposed on *carpets or carpeting of like character or description;* and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and *rugs* shall be forty per centum ad valorem.

The collector classified the rugs as "Tournay velvet rugs" at 45 cents per square yard and 30 per cent ad valorem. Plaintiff protested as follows:

> * * * claiming said goods to be dutiable as rugs at 40 per cent ad valorem, as provided by Schedule "K" (par. 378, Heyl., act of March 3, 1883) and not at 45 cents per square yard and 30 per cent, or as charged by you.

The provisions relating to duties on carpets which were referred to in paragraph 378 are contained in the first clause of that paragraph and in the eight preceding paragraphs, of all which the following only is material:

> Par. 370. Saxony, Wilton, and Tournay velvet carpets, 45 cents per square yard, and in addition thereto 30 per centum ad valorem.

One witness only was produced on each side.

Plaintiff was his own only witness. He admitted that the goods were called Wilton Daghestan rugs (p. 9), explaining the name as follows:

> We call these rugs Wilton Daghestan rugs simply because it is a plush fabric. The Wilton carpet is plush fabric. It is a fabric that is made on a wire that has a knife on the end of it, and when the knife cuts it it brings it to a plush. In that respect these rugs have the same character as a Wilton carpet, bu tthat applies to all plush fabric. * * * A Tournay velvet carpet is simply another trade name for a Wilton carpet. * * * We call it a Wilton Daghestan rug simply because it is a plush fabric, that is all. * * * "Wilton" is a technical word, nothing more or less, and we do not put it out to suggest the idea of a Wilton carpet or something resembling a Wilton carpet; but being a plush fabric it is known in the trade as Wilton and nothing more (pp. 9–11).

Plaintiff also insisted upon various distinctions between Wilton or Tournay carpets or Wilton rugs. He showed that the rugs in question were of worsted, woven as complete articles (although not separated when imported, but connected by the threads, which, when cut, form the fringe of the rug), and proceeded as follows:

> The back of a Wilton carpet is linen and jute. The back of *a rug* is cotton *to make it a soft fabric.* In weaving a Wilton carpet we use from three to five frames; *in a rug always six*, etc. * * * There is no similarity at all between a rug like Exhibit S and the Wilton carpet. As I have said before, in the one thing it is made for a carpet; in the other thing it is made for a rug. In the Wilton we use different materials. We not only use different materials in

> the weft, but we also use different materials in the quality of the worsted. Here is a thing which is a plush fabric, same as that, but any gentleman of the jury here can take those pieces of goods and put them together and can see very readily that they are two distinct things. We put worsted into the Wilton fabric and into the rugs like Exhibit S. The top is worsted. The back of Exhibit S is cotton, and the back of the Wilton carpet is linen or jute. * * * The loom upon which the Wilton carpets are woven is *a different loom from the one the rugs are woven upon.* This is fitted up for a rug loom, and nothing else made but rugs in that loom. * * * The loom upon which the Wilton Daghestan rugs are made is *a heavier loom* than the one on which you make a Wilton rug or a Tournay velvet carpet. For the Wilton Daghestan rug it has to be a heavier loom. In making up the six-frame we have to fit those looms for rug business, and rug business only. That does not refer simply to the size. They have to be specially fitted in this way. * * * *We could weave a rug on a loom with less than six frames if it was designed so. It depends on the design*, but we don't do that (pp. 9–11).

Defendant's only witness was Mr. William H. Sheehy, a rug dealer with experience in the retail and commission business and also in manufacturing. He testified that he had, prior to 1883, handled rugs similar to those imported and that he had manufactured them; and that their commercial designation was simply "Wilton rugs."

> Articles like sample S were bought and sold in trade and commerce of this country prior to the 1st of March, 1883, as Wilton rugs. A Wilton is a Brussels carpet cut. It is a plush carpet, more correctly speaking (p. 12).

ARGUMENT.

I.

The action of the parties at the close of the trial, each asking the direction of a verdict in his favor and neither asking to go to the jury, was equivalent to a stipulation waiving the jury and submitting the case to the decision of the court.

"The parties, by the motions made, each one of them virtually agreed to submit the question of fact to the judge." The defeated party, therefore, can not claim that the case should have gone to the jury. (*Dillon* v. *Cockroft*, 90 N. Y., 649; *Stratford* v. *Jones*, 97 N. Y., 586, 589; *Provost* v. *McEneroe*, 102 N. Y., 650.)

II.

The case being thus submitted to the court, and the stipulation not being in writing, the decision of the court is not reviewable upon writ of error. (*Bond* v. *Dustin*, 112 U. S., 604, and cas. cit.; *Spalding* v. *Manasse*, 131 U. S., 65.)

III.

Moreover, apart from this defect in the stipulation, the decision of the court can not be reviewed, because it is in the form of a general finding on the whole case. Findings of the court upon the evidence are reviewable only when they are special. It can not be claimed on writ of error that the facts do not support the finding if the finding is general. (*Ryan* v. *Carter*, 93 U. S., 78, and cas. cit.; *Santa Anna* v. *Frank*, 113 U. S., 339; *Lehnen* v. *Dickson*, 148 U. S., 71.)

IV.

There are only two conceivable views of this case:

(1) That there was not sufficient evidence of dissimilarity to go to the jury on (VI, *infra*). In that case, the direction of a verdict for the collector was correct. The question of similarity is not always for the jury, but when the evidence is clear and undisputed the court may take the case away from them. (*Fisk* v. *Arthur*, 103 U. S., 431.) It was conceded on the trial, on behalf of the importers, that there was "no material dispute on any point in the case." They can not now urge the contrary to secure a reversal.

(2) That there was enough, not only to go to the jury but even to warrant a direction in favor of the importers. This contention not only requires the establishment of most absolute and unmistakable dissimilarity (see VI, *infra*) but also asks the court to hold that a verdict may be directed upon expert-opinion evidence given by an interested witness. (See V, *infra*.)

(3) That there was a question for a jury. In view of plaintiffs' concession above quoted, this could only be urged by them on the theory that, though the evidence were undisputed, yet it was susceptible of different inferences of fact. In view, however, of their motion and concession at the end of the case and failure to ask to go to the jury, it is respectfully submitted that they estopped themselves from urging that it was a case for the jury; that they joined with defendant in effectually endowing the court with the functions of a jury; and that they can

no more assign error to its decision than they could have assigned error to the verdict of the jurymen, had the case been left to them.

V.

Assuming that there was sufficient uncontradicted evidence on plaintiffs' part to compel a verdict in their favor, if the jury should believe the evidence, nevertheless a verdict could not be directed by the court, for the jury were not bound to believe it. They could disbelieve it for two reasons: First, because it was in part expert-opinion evidence; second, because it was the evidence of a party to the action having a pecuniary interest in the result.

It is undoubtedly well settled in this court, as in others, that a verdict can and should be directed in favor of the party whose contention is established by uncontradicted, disinterested, and unimpeached witnesses, testifying to matters of fact as distinguished from matters of opinion, and whose testimony does not grossly violate the probabilities of the case; or in favor of the party with whom the presumptions lie, when no competent evidence is offered to rebut them; or even upon uncontradicted and unimpeached testimony of an interested party when he is called to the stand by his opponent; or upon admissions of an interested party against his own interest, as is common upon the issue of contributory negligence.

But it is also well settled that expert testimony as to values does not bind the jury. The experts may testify as to facts and give their opinion thereon; the jury may take the facts and give their own opinion. (*Murdock* v.

Sumner, 22 Pick., 156, 158, approved by this court in *Head* v. *Hargrave*, 105 U. S., 45, 51; 1 Wharton on Evidence, pp. 447, 454; *United States* v. *McGlue*, 1 Curt., 1, 9; *Fletcher* v. *Seckell*, 1 R. I., 269; *Anthony* v. *Stinson*, 4 Kans., 211; *City of St. Louis* v. *Ranken*, 95 Mo., 189; *Bee Printing Company* v. *Hichborn*, 4 Allen, 63, 65; *McReynolds* v. *Railroad Company*, 106 Ill., 152; *Johnson* v. *Railroad Company*, 37 Minn., 519.) "The rule is that if the court admits the testimony, then it is for the jury to decide whether any, and if any, what, weight is to be given to the testimony." (*Spring Company* v. *Edgar*, 99 U. S., 645, 658.) The principle is most familiarly applied to legal and medical expert testimony, but is not confined to these departments. The case first above cited concerned proof of value of chattels attached. The rule is sometimes very broadly laid down. "The opinions of experts, however intelligent and trustworthy, do not bind the conscience of the court." (*The Iberia*, 40 Fed. Rep., 893, 897; Lawson, Expert and Opinion Evidence, p. 240.)

All testimony of the plaintiff would have been inadmissible at common law. The common law presumed conclusively that he would lie. This rule has been changed by statute; but the statute has not gone so far as to bind the jury by his testimony if uncontradicted. The question first arose in the State courts of New York, in cases where the testimony offered was not only that of an interested party, but also more or less improbable. (*Elwood* v. *Western Union Telegraph Company*, 45 N. Y., 549; *Kavanagh* v. *Wilson*, 70 N. Y., 177, 179.) The court on both grounds held the testimony not controlling, and its opinions were quoted, approved, and applied by this court

in *Quock Ting* v. *United States* (140 U. S., 417, 421, 422. See also *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63). The New York courts have since laid down the rule plainly that the court can never take a case from the jury on the uncorroborated, although unimpeached and uncontradicted, testimony of a party or interested person, and that a request for a finding based on such testimony does not necessitate an affirmative answer. (*Gildersleeve* v. *Landon*, 73 N. Y., 609; *Dean* v. *Metropolitan Elevated Railway Company*, 119 N. Y., 540, 549, 550; *McNulty* v. *Hurd*, 86 N. Y., 547; *Honegger* v. *Wettstein*, 94 N. Y., 252, 261; *Canajoharie National Bank* v. *Diefendorf*, 123 N. Y., 191, 200.) It is respectfully submitted that this doctrine is unassailable, and should be borne in mind in examining the present record.

> The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witness was disinterested. That qualification must, in the present state of the law, be added. (Rapallo, J., in *Elwood* v. *Western Union Telegraph Company*, *supra*, at p. 554.)

VI.

Assuming, however, that the decision is reviewable, still the judgment must be affirmed, because the facts appearing in their testimony show that the rugs in question were commercially known as Wilton rugs, and were of like character or description to the Wilton or Tournay velvet carpets with which the collector classified them.

It must be remembered that similarity is not necessarily sameness. (*Greenleaf* v. *Goodrich*, 101 U. S., 278,

283.) An article may be of "like character or description" with another and yet not be the same thing. The collector's decision was presumptively correct, and the burden of overthrowing it by proof of dissimilarity was upon the plaintiff. (*Arthur* v. *Oakes*, 96 U. S., 118; *Herrman* v. *Robertson*, 152 U. S., at p. 523.)

The main differences in manufacture, as described by plaintiff, would apply to all rugs as distinguished from all carpets. Some differences mentioned seem to depend upon the pattern of the particular rugs imported, and not upon anything inherent in Wilton rugs or Wilton Daghestan rugs as a class.

No dissimilarity being shown by the testimony between a "Wilton rug" and a "Wilton carpet," except so far as every rug is dissimilar to all carpets, we are left to the test of commercial designation. This creates the strongest presumption that the character of the two articles is as nearly the same as the character of a rug and the character of a carpet can be. Commercial designation, it need not be said, is the final test when it is a matter of actual market usage. (*Cadwalader* v. *Zeh*, 151 U. S., 171, and cas. cit.) The trade name of the article seems to be particularly referred to by the phrase "of like character *or description*." (Cf. Rev. St., § 2499.) "Wilton" is certainly a trade name.

It might be inferred from a remark on page 10 of the record that there is some distinction between a plain Wilton rug and the Wilton Daghestan rug, but defendant's witness testified squarely that the article in question was

a Wilton rug, and plaintiff's counsel conceded that there was "no material dispute on any point in the case." It may be therefore taken for granted that if there is any distinction indicated by the use of the word "Daghestan," it is immaterial and need not here be considered.

Plaintiff does, indeed, give us his *ipse dixit* that "there is no similarity at all between a rug like Exhibit S and a Wilton carpet." But this sort of a conclusion of law does not bind the court or jury. (See plaintiff's brief, pp. 13, 14.) "It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts." (*Roberts* v. *N. Y. Elevated R. R. Co.*, 128 N. Y., 455, 465.)

VII.

Hence plaintiff's counsel is here forced to argue that the "rugs" first mentioned in paragraph 378 are not rugs at all, but only "portions of carpets or carpetings;" that is, pieces cut out of carpets.

This is a possible (although not the only possible) literal construction of the sentence; but we submit that it is untenable as the true construction, for various reasons.

It is unnecessary, because the words "other portions of carpets or carpetings" may equally well be read as applying to "bedsides" only, which are in fact mere pieces of carpeting.

It makes the paragraph rather absurd. Why should mere pieces of carpets be described with so much tautology?

It violates probability in giving two different meanings to the words "mats," "rugs," "screens," and "hassocks" in the same paragraph. If a rug *is* a piece of carpet, how can there be any "other" rug *than* a piece of carpet?

It is not accurate. A piece of carpet is not a rug, although it may be a "bedside." This is shown by plaintiff himself, who does not seem to have been testifying upon his counsel's present theory. He distinguishes easily between a rug and "a bedside * * * used as a rug" (p. 9).

It is inapplicable, for defendant's witness testifies that the article imported answers to the description of a Wilton, that is, a plush *carpet* (p. 12). So far as this may conflict with testimony of plaintiff, the question was for the court to decide.

VIII.

Plaintiff's exceptions to evidence relate to matters already discussed—the relevancy of testimony as to commercial designation, and the proper definition of "rugs." Plaintiff urges that the second question objected to—whether his rug answers the description of a Wilton carpet—asked for too much of a conclusion and called upon the witness to usurp the functions of the jury. But he is estopped from taking this point because he testified to an opinion just as broad on the other side himself (p. 10). Moreover, it seems to be a proper subject for expert testimony. (Rogers on Expert and Opinion Evidence, §§ 6, 152.) Nor, it seems,

can exceptions be considered at all in a case where the evidence is finally submitted by agreement to the court without written stipulation. (*Gilman* v. *Illinois & Miss. Tel. Co.*, 91 U. S., 603; *Spalding* v. *Manasse*, *supra*.)

It is therefore respectfully submitted that the judgment should be affirmed.

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